

International Brotherhood of Electrical Workers, Local 724, AFL-CIO (Albany Electrical Contractors Association, Inc.) and Richard P. Haggerty Jr. and Vincent Daly and David James.
Cases 3-CB-7097, 3-CB-7140-1, and 3-CB-7140-2

February 25, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On October 7, 1997, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.

1. The judge found, *inter alia*, that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to operate its hiring hall in conformity with the written requirements of its collective-bargaining agreement with Albany Electrical Contractors Association. More particularly, the judge found that the Respondent failed to adhere to written rules requiring applicants to re-sign the out-of-work book every 30 days, failed to enforce referral rules applicable to registrants who were over age 50, and failed to enforce contractual requirements pursuant to the "short call" definition of 40 hours, which identified jobs that an applicant could accept without losing his place on the referral list. No exceptions were filed to the judge's findings that the Respondent violated Section 8(b)(1)(A) and (2) in these respects.

The General Counsel contends that the judge's remedy for these violations is inadequate because it lacks a make-whole order applicable to users of the hiring hall who may have been detrimentally affected by the Respondent's failure to comply with the above-noted contractual rules. We agree.

The complaint alleges that since May 22, 1996, the Respondent failed to refer applicants for employment in accordance with the contractual referral procedures. The complaint does not identify any particular applicant by name who may have been affected by the Respondent's failure to adhere to its written referral rules as set forth above.¹ Instead, the General Counsel effectively alleges a class of applicants who were subject to the Respondent's hiring hall referral practices beginning May 22,

1996, the commencement of the 10(b) period, to March 3, 1997, the effective date of the Respondent's renewed adherence to contractual requirements.

We agree with the General Counsel that the judge's recommended Order does not provide an adequate remedy for applicants who used the hiring hall between May 22, 1996, and March 3, 1997, and who may have been adversely affected by the Respondent's unlawful failure to follow its contractual requirements.²

In the present case, an identifiable class of registrants who applied for work and sought referrals from the hiring hall were subjected to the Respondent's unlawful refusal to follow contractual requirements. In these circumstances, it is appropriate to leave to the compliance stage of the proceeding the identification of any applicants who may have been detrimentally affected by the Respondent's unlawful conduct. *Teamsters Local 328 (Blount Bros.)*, 283 NLRB 779 (1987).

Accordingly, we shall modify the judge's recommended Order so as to provide a make-whole remedy for users of the hiring hall who were adversely affected by the Respondent's failure to comply with contractual referral rules between May 22, 1996, and February 28, 1997. *Operating Engineers Local 3 (Perini Corp.)*, 305 NLRB 1111, 1117 (1992); *Teamsters Local 519 (Rust Engineering Co.)* 276 NLRB 898 (1985); and *Teamsters Local 328 (Blount Bros.)*, *supra*.

We also adopt the judge's finding that the Respondent violated Section 8(b)(1)(A) and (2) by failing and refusing to refer David James. As the judge found, the Respondent treated James differently than it did other "short-call" referrals who worked more than 40 hours, but less than 80 to 120 hours, when it removed James' name from the referral list. As the judge further found, the Respondent's treatment of James was arbitrary because, although it was consistent with its written rules, it was contrary to the manner in which other employees were treated.

We disagree with our colleague that the Respondent is being subjected to "Catch 22" rules. The violation concerning the other employees (sec. 1, above) was the failure to follow the contract. The violation concerning James was treating him differently from the others. Concededly, the differential treatment of James was that he, unlike the others, was treated in conformity with the contract. However, this does not give rise to a "Catch 22" situation. Each are discriminatory for different reasons.

¹ The complaint separately alleges that the Respondent failed to refer applicants Vincent Daly and David James because they engaged in protected concerted activities.

² The judge found that the Respondent's failure to follow the contractual provisions did not cause applicants Haggerty, James, or Daly to lose any referrals, although, as explained in sec. 2 below, he found that James was detrimentally affected by the Respondent's arbitrary failure to follow its actual practice regarding "short call" jobs. Contrary to the Respondent, it does not appear that the judge resolved the issue of whether any other hiring hall registrants may have lost employment opportunities.

The Respondent could have avoided all violations by treating everyone in accord with the contract.

AMENDED REMEDY

Having found the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act.

Having found that the Respondent failed to operate the referral procedures of its hiring hall in conformity with contractual requirements between May 22, 1996, and March 3, 1997, we shall order the Respondent to make whole any applicants determined at the compliance stage of this proceeding to have lost any earnings and other benefits as a result of the Respondent's actions during that period. The amount of backpay, if any, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment, minus tax withholdings required by law.

Further, as set forth in the judge's recommended remedy, we shall order the Respondent to refer David James, and other applicants, for employment in accordance with the hiring hall rules effective March 3, 1997, and make whole James for any loss that he may have suffered as a result of its failure to refer him for employment. We shall also order the Respondent to respond to Richard P. Haggerty's letters of October 11, 1996, and April 7, 1997, and Vincent Daly's request of October 1996, and to permit James to copy its out-of-work list.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, International Brotherhood of Electrical Workers, Local 724, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order, as modified.

1. Insert the following as new paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Failing to operate its hiring hall in conformity with the requirements of its contract with the Albany Electrical Contractors Association."

2. Add the following as paragraph 2(b) and reletter the subsequent paragraphs:

"(b) Make whole any applicants for referral who lost earnings and other benefits between May 22, 1996, and March 3, 1997, as a result of the failure to operate its hiring hall in conformity with contractual hiring hall referral requirements."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER FOX, dissenting in part.

In the absence of exceptions, I join in the majority's decision to adopt the judge's findings that the Respondent violated Section 8(b)(1)(A) and (2) by failing to operate its hiring hall in conformity with the written requirements of its collective-bargaining agreement with the Albany Electrical Contractors Association. However, contrary to my colleagues, I am unable to find that the Respondent also violated the Act by removing David James' name from the referral list based on his referral to an employer for whom he had worked approximately 56 hours.

As my colleagues concede, the Respondent's treatment of James was consistent with the contractual rules pertaining to short-term referrals. Thus, by adopting both parts of the judge's decision they have found that the Respondent violated the Act *both* by following its written rules, as it did in the case of James, and by not following its written rules, as was its general practice. The Respondent complains that by this reasoning, it is placed in an impossible "Catch-22" dilemma whereby removing James' name from the list and not removing his name from the list would equally have constituted violations of the Act. I agree and I therefore respectfully dissent.

Dated, Washington, D.C. February 25, 1999

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to operate our hiring hall in conformity with the requirements of our contract with the Albany Electrical Contractors Association.

WE WILL NOT restrain and coerce David James and other employees in the exercise of rights guaranteed in Section 7 of the Act, and WE WILL NOT attempt to cause and cause employers to discriminate against David James by arbitrarily and discriminatorily failing and refusing to refer David James to employment.

WE WILL NOT arbitrarily deny requests for information, or requests to copy hiring hall documents, from

employees who are registered for referral from our hiring hall and who reasonably believe that they have been improperly denied referrals.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL refer David James and other applicants for employment in accordance with the applicable hiring hall rules and WE WILL make James whole for any loss of earnings he may have suffered as a result of our failure to refer him for employment.

WE WILL make whole any applicants for referral who lost earnings and other benefits between May 22, 1996, and March 3, 1997, as a result of our failure to operate the hiring hall in conformity with contractual hiring hall referral requirements.

WE WILL honor James' request to copy certain of our referral records and answer the relevant questions contained in Richard Haggerty's letters of October 11, 1996, and April 7, 1997, and WE WILL provide Vincent Daly with the relevant information that he requested in October 1996.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 724, AFL-CIO

Alfred M. Norek, Esq., for the General Counsel.

Bruce Bramley, Esq. (Pozefsky, Bramley & Murphy), for the Respondent.

Pamela McMahon, Esq., for Charging Parties Daly and James.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on August 5, 1997, in Albany, New York. The amended consolidated complaint, which issued on June 27, 1997, and was later amended on July 22, 1997, was based on charges filed by Richard Haggerty Jr., Vincent Daly, and David James (James) on November 22, 1996,¹ February 21, 1997, and February 21, 1997, respectively, as well as an amended charge that was filed by Haggerty on February 25, 1997. The complaint alleges that International Brotherhood of Electrical Workers, Local 724, AFL-CIO (the Respondent or the Union) violated Section 8(b)(1)(A) and (2) by denying hiring hall information to Haggerty, Daly, and James, has failed and refused to refer applicants for employment in accordance with the referral procedure set forth in its contract, and has failed and refused to refer Daly and James for employment because they engaged in protected concerted activities, including criticizing the manner in which the Respondent operated its hiring hall and criticizing the conduct of Respondent's officers. In regard to the former allegation, it is alleged that the Respondent did not reply to written requests for information by Haggerty dated October 11 and April 7, 1997, did not provide Daly with a copy of the "out-of-work list" that he requested in October, nor did it permit him to copy the list, and did not permit James to review and copy the "registrant" list, which he had requested in November.

¹ Unless indicated otherwise, all dates referred to here relate to the year 1996.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that the employer-members of Albany Electrical Contractors Association, Inc. (the Association) whose member-employers are engaged in the electrical contracting industry, purchased and received goods and services valued in excess of \$50,000 at their jobsites located in the State of New York directly from points located outside the State of New York. I therefore find that the Association, and the employer-members of the Association have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The allegations herein can be divided into two areas: the failure and refusal to furnish requested information to Haggerty, Daly, and James, which includes the alleged failure of the Respondent to allow them to review, take notes of, copy or be given a copy of the requested items, allegedly in violation of Section 8(b)(1)(A) of the Act. In addition, it is alleged that since about May 22, the Respondent has failed and refused to refer applicants for employment in accordance with the referral procedure set forth in its contract with the Association (the contract) and, additionally, had failed to refer Daly and James for employment because they engaged in protected concerted activities, including criticizing the manner in which the Respondent's agents operated its hiring hall, in violation of Section 8(b)(1)(A) and (2) of the Act. The allegation that the Respondent failed to refer applicants for employment in accordance with the terms of its contract with the Association refers to the period from about May 22 to February 28, 1997, at which time the Respondent notified its members, by mail, of changes in the operation of the hiring hall, effective March 3, 1997. Counsel for the General Counsel does not allege that this violation continued after that date.

III. ALLEGED UNLAWFUL OPERATION OF THE HIRING HALL

The relevant sections of the contract are:

Section 2.23. On all jobs requiring five (5) or more Journeymen, at least every fifth Journeyman, if available, shall be fifty (50) or older.

Section 4.11. The Union shall maintain an "Out-of-work list" which shall list the applicants within each Group in chronological order of the dates they register their availability for employment.

Section 4.12. An applicant who has registered on the "Out-of-work list" must renew his application every thirty days or his name will be removed from the "List".

Section 4.13. An applicant who is hired and who receives through no fault of his own, work of forty hours or less, shall upon reregistration, be restored to his appropriate place with his Group.

Section 4.15. The only exceptions which shall be allowed in this order of referral are as follows:

- (a) When the Employer states bona fide requirements for special skills and abilities in his requests for applicants, the Business Manager shall refer the first applicant on the register possessing such skills and abilities.
- (b) The Age ratio clause in the Agreement calls for the employment on the basis of age. Therefore, the Business Manager shall refer the first applicant on the register satisfying the applicable age requirements provided, however, that all names in higher priority Groups, if any, shall first be exhausted before such coverage reference can be made.

By letter dated February 28, 1997, to its members, the Respondent, by Harold Joyce, its business representative, stated, *inter alia*:

After many lengthy discussions with members and especially among our officers we have decided to change our rules effective March 3, 1997.

We will now provide a referral application to be completed by each and every applicant.

The referral book will be available for registration 9:00 A.M. to Noon, Monday-Friday, on regular working days.

All applicants shall sign and resign the applicant book in person. Resign must be on or before the 30th day following the original sign in or resign date.

Post cards or facsimile resigns will only be accepted if a traveling member is working for a contributing contractor outside our jurisdiction.

Any one who is hired and who receives through no fault of his or her own, work of 40 hrs. or less, shall upon resigning the book be restored to their original place in the book.

Anyone who refuses a referral will be considered not available for work and must resign on the bottom of the list.

It is alleged that between about May 22 and March 3, 1997, the effective date of this letter, the Respondent violated Section 8(b)(1)(A) and (2) of the Act by not requiring applicants to resign the out-of-work book every 30 days, by not enforcing the over 50 age preference, and by not strictly enforcing the contractual "short call" definition of 40 hours.

The general procedure followed at the exclusive hiring hall operated by the Respondent was that when members were laid off or were looking for employment, they went to the hall and signed their name on the out-of-work list or book (the list) and, at times, together with the date and their telephone number. Generally, referrals were to be made in the order of the applicants on the list; those that had signed earliest were sent out first. If the referral was a short call, the applicant's name was not crossed off the list. Admittedly, prior to March 3, 1997, the Respondent did not require applicants to resign the out-of-work list every 30 days. Additionally, the parties stipulated that prior to March 3, 1997, the Respondent applied section 4.13 in a manner that short calls lasted in excess of 40 hours, allowing the affected applicants to retain their positions on the list. Haggerty testified that in his experience, 39 years as a member of the Respondent, a short call was any employment from 40 to 200 hours. Morgan James testified that in about August he obtained a referral for 108 hours of employment that was considered a short call. Daly testified that a short call could be any employment up to 200 hours. Joyce testified that the reason that the Respondent did not enforce the 40-hour provision strictly

was that they found that under that provision the Union could not get enough applicants to accept these short-call referrals. He testified that the two most frequent uses of short calls are industrial plant shutdowns, where the contractors need employees for 2 weeks employment with overtime, and finalizing jobs, where the contractor needs a few extra men for 3 to 4 weeks in order to complete the job. He found that it wasn't fair that the employees sent out on these referrals for 2 or 3 weeks went back to the bottom of the list with the employees who had worked on the same job regularly for as much as a year. Because of the inherent unfairness of this, these jobs were difficult to fill because applicants did not want to lose their place on the list for 2 weeks' work. It wasn't fair to the applicants and it wasn't fair to the contractors because he couldn't supply them with the number of men that they requested; therefore, "we never held to that." Joyce testified that this problem and this practice was discussed at about half of the union meetings and at about half of the officers meetings. Under the system effective March 3, 1997, if he calls an applicant for a referral that will last 45 hours, the applicant has a choice of accepting the referral and going to the bottom of the list when he passes 40 hours on the job and resigns the book, or refusing the referral and being crossed off the list, because applicants may no longer refuse referrals.

The other provisions that allegedly were not followed were sections 2.23 and 4.15(b). Haggerty, who is 60 years old, testified that he never received a referral based on this provision prior to March 3, 1997, and knows of nobody else who has. Until a few years ago, he used to write his age in the out-of-work book when he signed it, but stopped doing it because it did no good. In about August, he told Joyce that at a Cargill job there were seven electricians, none of whom were over 50. He testified that Joyce said, "What do you want me to do about it? I can't find out what's going on at every job." On another occasion Joyce told him that he didn't want to enforce the over 50 rule because everyone will hear about it and "we'll have a whole bunch of guys up here 50 and over." He testified further that on March 21, 1997, Joyce called him and told him that he was going to enforce the 55 and over rule. Haggerty corrected him and said that it was 50 and over. Joyce said that he was sending him to the FPI job. Haggerty asked if there was anyone over 50 ahead of him on the list and Joyce said that there was not. Haggerty corrected him and told him that Daly was over 50 years of age, and Joyce said that he didn't believe so, but that he would check. A few hours later, Joyce called him back and said that Haggerty was correct, and that Daly would get the FPI referral. A few days later, Haggerty took Daly's place on that job, and that was the first time that he received a referral based on sections 2.23 and 4.15(b). Daly testified that in his 33 years as a member of the Respondent, he never received a referral based on sections 2.23 and 4.15(b) prior to March 1997. In either January or May he asked Joyce if he was enforcing this rule, but Joyce never responded. Joyce testified that he did not regularly police this provision to be sure that for every job with five employees or more, one was over 50 years of age. The employees and the foremen police it and call him to report any problems. The only complaint that he ever received about the enforcement of this provision was Haggerty's complaint about the complement of employees at the Cargill job: "The irony was I had sent an over 50 to that job and the man begged to get off the job because it was a very, very tough job."

There was also some testimony regarding section 4.15(a), more particularly regarding the Respondent's members who were employed at a General Electric plant in Selkirk, New York. Briefly stated, I find that the Respondent's referral of some applicants under the special skills provision of section 4.15 did not conflict with the terms of that section of the contract.

It is undisputed that between May 22 and March 3, 1997, the Respondent did not operate the hiring hall pursuant to the terms of the contract, more particularly the definition of short calls as employment of 40 hours or less, the requirement that applicants resign the list every 30 days and the one in five requirement for applicants over the age of 50. I find that the Respondent's failure to enforce these provisions was not done in bad faith. In fact, based on Joyce's credible testimony, I find that the failure to enforce that 30-day resigning provision and the 40-hour short-call provision was probably more equitable to the Respondent's members and contractors. I also find that there is insufficient evidence to establish that Joyce's failure to follow these contractual provisions caused Haggerty, James, or Daly to lose any referrals, except as set forth below as regards James. However, as set forth in the Brief of Counsel or the General Counsel, bad faith is not required. The issue therefore is, does a union violate Section 8(b)(1)(A) and (2) of the Act by failing to operate its exclusive hiring hall in conformity with the contractual provisions even absent direct proof that this change caused specific applicants to be denied referrals that they would have otherwise received?

In *Iron Workers Local 118*, 309 NLRB 808 (1992), the Board ruled that the departure from hiring hall rules, "absent some justification related to the efficient operation of the hiring hall, are arbitrary actions and inherently breach the duty of fair representation owed to all hiring hall users and violate the Act." In *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 124 (1995), the administrative law judge stated: "The Board explicitly holds that a union operating an exclusive hiring hall has a duty to apply lawful contractual provisions in administering the system and that a failure to do so may result in a violation of Section 8(b)(1)(A) and 2 in appropriate situations even in the absence of a finding of specific discriminatory intent." In *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), the Board stated:

Any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

In *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996), the Board stated: "The Board has held that when a union changes the rules governing its operation of an exclusive hiring hall, it must make 'a good faith effort to give timely notice of the rule change in a manner reasonably calculated to reach all those who [use] the exclusive hiring hall.'"

Based on the above, I find that by failing to operate the exclusive hiring hall in conformity with the terms of the contract the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

Joyce testified generally that some of the referral issues were discussed at many of the Respondent's meetings. However, because the evidence establishes that only a small proportion of the Respondent's members attend the regular monthly meeting, that does not satisfy the notification of change rule as stated in *Sheet Metal Workers*, supra; and *Plumbers Local 230*, 293 NLRB 315 (1989).

B. Alleged Discrimination in Referrals

It is alleged that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to refer Daly and James because they engaged in protected concerted activities, including criticizing the manner in which the Respondent administered its referral procedures and criticizing the conduct of Joyce and Timothy Paley, organizer, in serving as officers of the Respondent. Daly ran for president of the Respondent in about 1995 against the incumbent, Phil Clemens; Joyce supported most of the incumbents and Daly lost the election. At the January 1997 membership meeting, Daly distributed a letter to each of the members objecting to a proposed increase in dues and assessments and, at this meeting, he asked Joyce where certain funds were, and Joyce answered that it was in litigation, and he would not answer. Daly responded, "Well, it's our union money, we should have some kind of an answer." In early 1996 the Respondent pressed intraunion charges against Daly based on a letter sent by union member(s) in Rochester, New York, alleging that, while working in that jurisdiction, Daly promoted a slowdown, was constantly badmouthing the Respondent, and caused major damage to several walls, all in violation of union rules. Joyce was not one of the individuals who brought these charges against Daly. The Respondent found him guilty of these charges, but the International Union, by letter dated March 14, dismissed the charges, stating: "The dismissal of these charges in no way condones the alleged behavior, by any member of the Brotherhood, which was cause for the charges to be filed." Daly testified that on about March 12, 1997, he went to the union hall and asked Joyce how things were going, and Joyce said that things were slow. Daly said that he would go out as a salt, and Joyce told him to speak to Paley who was in charge of salts. Daly told Joyce that since he appointed Paley and was responsible for him, he could send him out as a salt. Joyce responded: "Are you trying to put words in my mouth? Because one of these days when I'm out of office, I'm going to come and look you up." Joyce testified that when Daly offered to be a salt, he told Daly that he had to speak to Paley, who is in charge of the salting program. As to the latter statement that Daly attributes to him, Joyce said that the situation that Daly may be referring to occurred in July 1997, when Daly asked for some information and Joyce told him to put the questions in writing. Daly told him that he had to answer the questions because they were going to the NLRB. Joyce then said, "Vinnie, one of these days you'll have your wish and I'll be out of here and then I'll come and look you up." Daly asked, "Then what?" Joyce said, "When I'm out of this job I can talk to you. Meanwhile, we're going to talk in writing." Joyce testified that he wasn't aware of Daly's leaflet distributed at the January 1997 meeting until after the monthly meeting was over, but during the meeting, Daly said that he heard that there was a rumor of a lawsuit, and he responded, "What rumor? We've talked about it at six or seven union meetings out of the last ten." Joyce testified further that there were no words between them over the

leaflet and he took no retribution or action against Daly because of it.

Daly signed the out-of-work book on January 12, as No. 466. During the balance of 1996 he received no referrals from the Respondent's hiring hall. He did obtain employment on his own from June 17 until October 11 in Buffalo, New York, and from October 30 through December 18 in Delaware. Members are allowed to solicit work outside of the Respondent's territory, and when Daly obtained the job offer in Buffalo, he asked Joyce for a letter permitting him to work in that local's jurisdiction, and Joyce gave him the letter. Under the Respondent's rules, applicants do not lose their position on the list while employed outside of the Respondent's territory. During these periods he called Joyce and asked, "How's work?" and Joyce said, "Things are slow." He has had three referrals from the hall since returning from Delaware. Daly points to a number of applicants who he claims were improperly referred ahead of him. Joseph Rysedorph signed the list on April 19 as No. 484. He and Vern Brown (No. 487 as he signed the list on April 19) were referred to Dwight Electric on December 17. Joyce testified that he didn't call Daly for this referral because it was in Schenectady, in the jurisdiction of another local, and he wouldn't call somebody who is already out of town for another out of town job.² Mike McGuire, No. 479, signed the list on March 28 and was referred to a light commercial job at Martin on September 15. Light commercial work is defined as work under \$10,000 labor cost with a reduced wage rate. Applicants who obtain light commercial work do not lose their position on the list. Joyce testified that because of the reduced rate for this work, many of his members refuse this work and he sometimes has a difficult time filling these jobs. McGuire's family situation makes these jobs acceptable to him, and that is why Joyce referred him to the Martin job on September 15. Joyce testified, "Any time anybody wants to work light commercial all they got to do is let me know and I can probably get them out the next day." Morgan James, No. 485, and the brother of Charging Party James, signed the list on April 19 and was also sent to Martin on September 15 for a short call. Joyce testified that he was away on that day and Paley made the referral, which he agrees with. Martin called with a problem; they needed a few people and specifically asked for Morgan James, apparently pursuant to section 4.15(a) of the contract, and Paley sent him. The final applicant who, it is alleged, was improperly referred ahead of Daly and James is Fred Harlfinger, No. 470, who signed the list on January 29. He was referred to Schenectady Hardware on December 9. Joyce testified that the employer asked for five or six men and specifically asked for Harlfinger. Daly's name was ahead of his on the list, but the employer refused Daly, in writing, and Joyce showed that refusal to Daly.

James has been a member of the Respondent for 12 years. This allegation of discrimination in referrals commenced after Joyce referred him to a job at Kasselmann Electric (Kasselmann). On about March 5, Joyce referred David James to the Kasselmann job, notified him that it was a long term job, and crossed his name off the list. He worked on the job for 9 days, at which time, on about March 18, Ken Eggleston, Kasselmann's superintendent, told him that they would have to lay him off at that

time because other of their jobs were shutting down and they were bringing those men over to James' job. On about that day he went to the Respondent's hall and told Joyce what Eggleston had told him; Joyce assured him that he would be sent out on the next available job, and he did not resign the out-of-work list at that time because Kasselmann was a short call. At the April union meeting, a fellow member told James that he was at the bottom of the list. He went to speak to Joyce, who told him that he had screwed up on the job and there was nothing that he could do for him, and James notified his brother of what Joyce said. Morgan James testified that at the conclusion of the union's monthly meeting in April, his brother told him that Joyce told him that he was being placed at the end of the list and was not going to be sent back out because he screwed up a job. He went to speak to Joyce, who denied saying that, and assured them that James would be number one on the list. Joyce testified that he does not specifically recall this conversation, but in similar situations he told James that Kasselmann would not take him back, and that he couldn't do anything for him, but that he should sign the list. James testified that in about May, while he was at the Respondent's office, and was checking the referral list. Joyce told him that he had screwed up the job at Kasselmann, but never told him who said that, and that there was nothing that he could do for him and he would not be going out to work. James asked who from Kasselmann told him that, and offered to go to the jobsite to show him his work. At the conclusion of the conversation Joyce told him that he retained his spot on the list and would be the first to go out. In about June, while James was at the union hall, Joyce told him that if he didn't stop bothering him, he would not send him out to work. Joyce testified that he never made any threat to James that he would not be sent to work. In July Morgan James had another conversation with Joyce about his brother. Joyce told him that his brother had worked for over ten contractors and was incompetent and that there wasn't a contractor in Albany who wanted him. Morgan James replied that he (Morgan) had worked for many contractors as well and had never been refused by anyone. He also asked Joyce which contractors had refused to accept his brother, but Joyce did not respond. Joyce concluded by saying that his brother was going to be number one on the list and would be sent out as soon as possible, "...just keep this quiet." Joyce testified that he does not recall ever telling James that he was number one on the list; he could not have said that because James was not on the list at that time. James testified that he did not resign the list until about November 1 because Joyce told him and his brother on a number of occasions that he would be the next applicant sent out, so he thought that he did not have to resign the list. Morgan James testified that he never heard Joyce tell his brother to resign the list.

James found employment on his own in Buffalo, New York, between July and September, working under the jurisdiction of the Respondent's sister local. He called Joyce from Buffalo, and Joyce told him to stay there, that there was no work in Albany. James testified further that on about November 1, while at the Respondent's office, he told Joyce that 67 names after his name had been referred to work, and he wanted to know where he was on the list. He also told Joyce that he needed 4 and 6 weeks of employment to qualify for unemployment and health benefits under the contract. Joyce told him to sign the list and he would send him out for 4 weeks, but that he should keep it quiet; he was not referred to work during this period. Joyce testified that although he does not recollect any conversation

² Joyce testified that out-of-town referrals, such as Dwight, are not considered referrals off the list. James and Daly testified that when they work out of the Respondent's jurisdiction their names are not removed from the list.

with James on November 1, he remembers that as the day that James finally accepted that he was not on the list and had to resign the out-of-work book. By letter dated November 21, James wrote to the International to complain about his lack of referrals since the Kasselmann job. He received a response dated December 4 stating that an international representative would investigate the matter. Subsequently, after filing a charge with the Board, James decided not to participate in the contractual appeals committee proceeding. In about June 1997, James was referred to two jobs in the area, each for 40 hours, thereby remaining on the list.

Joyce testified that in March he referred James to the Kasselmann job, believing that it was a long term job that would last about a year. After 1 week, but less than 2 weeks, by which time his name was taken off the list, James came to the Respondent's office and told Joyce that he was laid off through no fault of his own; another of Kasselmann's jobs was shut down unexpectedly and the men were transferred to his job and took his place. Joyce told him: "David, you've lost your spot on the list, you were assigned to a real job, it wasn't a short call."

He told James that the job that he had was his, and when the closed job reopened, and the transferred employees returned to that job, he would return, but, absent that, he could not refer him to another job because he was taken off the list based on the Kasselmann job. Shortly thereafter, Joyce called Kasselmann and spoke with Paul Kasselmann. He told him of the situation with James and asked when James could expect to return. Kasselmann said that he would look into it and call him back. Shortly thereafter, Kasselmann called him back and said that he had spoken to his superintendent, and said, "That guy, we're not going to take him back." Joyce then told James that Kasselmann was not going to take him back, and that he should resign the list, and he would see what he could do for him.

Joyce testified that 1996 was a very bad year in terms of the number of referrals that the Respondent sent out; he estimated that it might have been as little as one or two a month on average. He testified further, that it was so bad that the Union's trustees decided to waive the 200 hours employment requirement for members in the pension plan for 1996.

It is alleged that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to refer Daly and James because of their protected concerted activities, including their criticism of the way Joyce administered the hiring hall. I would dismiss the allegation as regards Daly. It is alleged that this refusal to refer has continued since August 22, but that was apparently because of Section 10(b) of the Act and the fact that the first relevant charge was not filed until February 21, 1997. In actuality, the refusal to refer Daly occurred sometime after he signed the list, January 12. However, the evidence supporting this allegation is limited. His only intraunion activity was running for president in 1995 when the incumbent had Joyce's support. The charges that were filed against him in early 1996 were initiated by members of a sister local and were not brought by Joyce. The letter that he distributed at the January 1997 union meeting was a year after he signed the list, and there is no evidence of animosity by Joyce other than his testimony about the March 12, 1997 conversation after he had asked to salt. Although I found neither Daly nor Joyce to be an especially direct and credible witness, of the two I would credit Joyce and his version of this conversation. These facts, together with Joyce's credible testimony about the low number of referrals from the hall, convince me that the General Counsel has not established that Daly's

lack of referrals was caused by his protected concerted activities, and I therefore recommend that this allegation be dismissed.

I find, however, that the evidence supports the allegation that the Respondent's failure to refer James violated Section 8(b)(1)(A) and (2) of the Act. One difference is that this allegation is supported by the testimony of a credible witness, Morgan James, who testified in a direct and believable manner. The Respondent's defense is based on Joyce's totally unsupported testimony that Kasselmann wouldn't take James back. I need not discuss whether the failure to refer was caused by his intra union activity. Rather, the evidence establishes that Joyce crossed James' name off the list after he was laid off by Kasselmann after about 56 hours of employment. At the time, and up until March 3, 1997, the Respondent was not removing names from the list until the employee had worked about 80 to 120 hours. *Plumbers Local 38*, 306 NLRB 511 (1992). By making this Change in its referral procedure, apparently only for James, thereby affecting his employment, the Respondent violated Section 8(b)(1)(A) and (2) of the Act. It makes no difference that James knew in March that his name was crossed off the list and that he did not resign the list until November 1. Even if he had resigned the following day, he would have been at the bottom of the list.

C. Alleged Refusal to Provide Information

Haggerty signed the out-of-work book on February 2 as No. 471. Although it is not alleged as a violation here, he claims that a number of applicants who signed the list after he did, such as McGuire, Rysedorph, Morgan James, and Brown were improperly referred ahead of him. In about late August or early September, Haggerty told Joyce that he wanted the names of all the applicants who were referred to employment by the Respondent since February 2, the hours that they worked and their place on the list. Joyce replied, "That's impossible, plus the secretary is sick." He testified that he asked for this information because he felt that he was being bypassed on the list and was being discriminated against. By letter dated October 11 to Joyce, Haggerty requested the following information since his layoff:

1. The name of those who have been sent out to work in the LU724 territory since 2/3/96, including those sent out on "short calls", and the name of the contractor they were employed by.
2. The total number of hours worked of anyone who has been sent out to work in the LU 724 territory since 2/3/96, including those sent out on "short calls."
3. The position on the "out-of-work list" of anyone who has been sent out to work in the LU724 territory since 2/3/96, including those sent out on "short calls."

Haggerty hand delivered this letter to Joyce a day or two later at the Respondent's hall. A few days later, Haggerty asked Joyce about the letter and Joyce said that he gave it to the Executive Board. At about this time, Haggerty offered to look through the Respondent's books with his wife to collect the requested information, but Haggerty replied, "No way, you can't do that." At the Respondent's October membership meeting, Phil Garafolo, a member of the Respondent's executive board, said that the union had received a letter from Haggerty,

that he had a right to look at the Respondent's out-of-work book, but that he could not copy information from the book or how long people remained on jobs. Joyce testified that after Haggerty gave him the letter, he gave it to the Union's executive board members. At the Union's executive board meeting on October 22, a motion was passed stating: "If Brother Haggerty wants this information he can come into the office during normal business hours and examine the book and get this information for himself at his leisure," and these minutes were read at the next union meeting, which Haggerty attended.

In about March 1997, Haggerty requested certain information from the list and the Respondent provided him with photocopies of 14 pages from the list, from November 6, 1995, to February 12, 1997, the last entry. After reviewing these documents, by letter dated April 7, wrote to Joyce requesting the following information:

Re: Michael McGuire #479-the name of the contractor(s), other than Martin named on the list, that he was referred to for work, the date(s) and the number of hours, including those with Martin, that he worked from 3/28/96 to 2/27/97.

Re: Joseph W. Rysedorph #484-the name of the contractor(s), other than Dwight named on the list, that he was referred to for work, the date(s) and the number of hours, including those with Dwight, that he has worked from time of lay-off (no date on list) to 2/27/97.

Re: Morgan James #485-the name of the contractor(s), other than Martin named on the list, that he was referred to for work, the date(s) and the number of hours, including those with Martin, that he has worked from time of lay-off (no date on list) to 2/27/97.

Re: Vernon Brown #487-the name of the contractor(s) that he was referred to for work, the date(s) and the number of hours that he worked from 4/19/96 to 2/27/97.

Haggerty handed the letter to Joyce shortly after April 7, 1997. He made this request because all these applicants were below him on the list and were referred ahead of him: "If I could get something like this, I would know what was happening. They were all behind me and they were all working." Haggerty has received no response to this letter. Joyce testified that shortly after Haggerty gave him this letter, he told Haggerty that he gave it to the Respondent's lawyers and was waiting for a response. Shortly before the commencement of the hearing, the Respondent realized that no response had been given, although Joyce testified that the Respondent intends to give him the information that he asked for.

In November, James went to the union hall with a notebook and pen and prepared to review the list. Paley stopped him and told him that he could not copy from the referral list. James testified that he needed this information to establish that he had been discriminated against in referrals, and to support the allegations that he made in his November 21 letter to the International. Paley did not testify.

Daly testified that in October, while at the union hall, he asked Joyce for a copy of the Respondent's records and its pension records that showed the number of hours that the members worked. The out-of-work book does not give this information. Joyce responded, "No way." Daly testified that only by looking at the pension contribution records that the employers send to the Respondent could he determine the number of hours that were worked by those that were referred from

the hiring hall in order to determine if he was improperly passed over in referrals. The Respondent never gave him this information. He never put this information request in writing, and the Respondent never offered him the opportunity to examine its records which show the hours worked by the members. Joyce testified that Daly has asked for a lot of items and he told Daly to put the request in writing, but he never did so.

The information requests by Haggerty and Daly had a similar purpose, to learn whether other applicants were improperly referred ahead of them. Haggerty's requests were in writing, Daly's was not. James did not request any information, rather, the alleged violation as to him is that the Respondent refused to allow him to copy information from its out-of-work book, and the denial of this right clearly violates Section 8(b)(1)(A) of the Act. In *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205 fn. 2 (1995), the Board stated: "When a member seeks photocopies of hiring hall information because he reasonably believes he has been treated unfairly by the hiring hall, the union acts arbitrarily by denying the requested photocopies, unless the union can show the refusal is necessary to vindicate legitimate union interests." There is no practical difference between James' request and a request to photocopy records, and the Respondent did not provide a reason for the refusal, nor could it. The refusal to allow James to copy entries in the Respondent's out-of-work book therefore violates Section 8(b)(1)(A) of the Act.

It is also alleged that the Respondent violated Section 8(b)(1)(A) of the Act by refusing to respond to the questions asked of it by Haggerty in the letters of October 11 and April 7, 1997, and by refusing to respond to Daly's October information request made to Joyce. These were not simply requests for copies of the out-of-work list, but were requests that went deeper; the number of days and the number of hours worked by those referred out of the hall, the contractor that they were referred to and (Daly's request) the Respondent's pension records which would establish the number of hours that these individuals worked for each contractor. In *Teamsters, Local 282*, 280 NLRB 733, 735 (1990), the Board stated: "We agree with the judge that a union has an obligation to deal fairly with an employee's request for job-referral information and that an employee is entitled to access to job-referral lists to determine his relative position in order to protect his referral rights." The court, in *NLRB v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987), stated: "A union breaches its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the member has been fairly treated with respect to obtaining job referrals." The law would be illusory if it limited individuals to the information contained on the out-of-work list. No hiring hall participant could determine whether they had been treated fairly by the hall simply from the contents of this book. For example, only by inspecting the Respondent's pension report records could they learn of the actual hours that applicants worked and whether the job was truly a short call. Additionally, it is possible that an inspection of the Respondent's books would truly establish whether certain referred jobs were light commercial work as testified to by Joyce. Applicants at a hiring hall need not take the word of the union official making the referrals; they are entitled to the underlying books and records in order to determine whether they were treated fairly by the hiring hall. Haggerty and Daly were entitled to

know the number of hours that McGuire, Rysedorph, Morgan James, Brown, and Harlfinger worked during the period in question since that is the only way that they can determine whether these individuals were improperly referred to their jobs ahead of them. The Respondent has no valid defense to its failure to provide the information. At one point Joyce testified that there were very few referrals during 1996, maybe one or two a month. With this small number, the Respondent cannot claim that the requests are overly burdensome. Additionally, Joyce defended his refusal to give the information to Daly because he told Daly to put the request in writing, and he never did. However, Haggerty's requests were in writing and were never answered. I therefore find that by failing to provide Daly and Haggerty with the information that they requested, the Respondent violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. The Association and the employer-members of the Association have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to operate its hiring hall in conformity with the requirements of its contract with the Association.

4. The Respondent violated Section 8(b)(1)(A) and (2) of the Act by its failure and refusal to refer James to employment.

5. The Respondent violated Section 8(b)(1)(A) of the Act by denying the requests of Haggerty and Daly for certain hiring hall information, and the request of James to copy certain hiring hall information.

THE REMEDY

Having found that the Respondent has violated the Act as alleged in the complaint, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent altered its hiring hall practices effective March 3, 1997, no affirmative remedy is needed therein. Having found that the Respondent unlawfully refused to refer James to employment since August 22, I shall recommend that the Respondent be ordered to refer James, and other applicants, for employment in accordance with the hiring hall rules effective March 3, 1997, and to make James whole for any loss that he suffered as a result of its failure to refer him to employment. I shall also recommend that the Respondent be ordered to respond to Haggerty's letters of October 11 and April 7, 1997 and Daly's request in October, and to permit James to copy its out-of-work list.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local 724, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Restraining and coercing David James and other employees in the exercise of rights guaranteed in Section 7 of the Act, and attempting to cause, and causing, employers to discriminate against James, by arbitrarily and discriminatorily failing and refusing to refer James for employment.

(b) Denying employees registered for referral the names of the employers, the dates they were employed, and the number of hours worked by individuals who were referred ahead of them, together with the documents establishing these facts.

(c) Denying employees registered for referral the right to copy or make duplicates of hiring hall records.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Refer David James and other applicants for employment in accordance with the applicable hiring hall rules and make James whole for any loss of earnings he may have suffered as a result of the Union's unlawful failure to refer him to employment.

(b) Answer Haggerty's letters dated October 11 and April 7, 1997, provide Daly with the information that he requested in October, and allow James to copy its out-of-work list.

(c) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(d) Within 14 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. October 7, 1997

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain and coerce David James and other employees in the exercise of rights guaranteed in Section 7 of the Act, and WE WILL NOT attempt to cause and cause employers to discriminate against David James by arbitrarily and discriminatorily failing and refusing to refer David James to employment.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT arbitrarily deny requests for information, or requests to copy hiring hall documents, from employees who are registered for referral from our hiring hall and who reasonably believe that they have been improperly denied referrals.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL refer David James and other applicants for employment in accordance with the applicable hiring hall rules

and WE WILL make James whole for any loss of earnings he may have suffered as a result of our failure to refer him for employment.

WE WILL honor James' request to copy certain of our referral records and answer the relevant questions contained in Richard Haggerty's letters of October 11, 1996, and April 7, 1997, and WE WILL provide Vincent Daly with the relevant information that he requested in October 1996.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 724, AFL-CIO